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In the Supreme Court of the United States

OCTOBER TERM, 1995

ARRE KENNEDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that narcotics evidence was admissible under the inevitable discovery exception to the exclusionary rule.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 61 F.3d 494. The order of the district court denying petitioner's motion to suppress (Pet. App. 19-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1995. The court of appeals denied a petition for rehearing on September 25, 1995. Pet. App. 27. The petition for a writ of certiorari was filed on December 26, 1995 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 120 months' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-18.

1. On July 25, 1993, petitioner flew from Detroit, Michigan, to Miami, Florida, on Northwest Airlines (Northwest). He checked two locked pieces of luggage, a blue suitcase and a black suitcase. Northwest mistakenly labeled petitioner's suitcases with tags bearing the name of Wesley Kennedy, a Northwest passenger unrelated to petitioner. As a result, petitioner's suitcases were misrouted and sent to National Airport in Washington, D.C. At National Airport, Wesley Kennedy, who had flown from Detroit to Washington, discovered that his own bag was missing and reported the problem to Deborah Hawkins-Garner, a Northwest employee. Hawkins-Garner showed petitioner's two suitcases to Wesley Kennedy, who informed her that the suitcases were not his. Pet. App. 2.

Northwest's policy regarding lost luggage was to open the suitcase to check for identification and, if there was no identification, to inventory the contents. Pursuant to that policy, Hawkins-Garner decided to open the suitcases to see if they contained any identification. She was unable to open the black suitcase because it had a combination lock. She was able to open the blue suitcase because it had a lock that could be opened with a Northwest key. The blue

suitcase contained $176,000, which was promptly reported to the Metropolitan Washington Airport Authority Police Department. Pet. App. 2-3, 20.

Officer Simon Mantel responded and was later joined by Sergeant Arthur Taplett. Sergeant Taplett's suspicions were aroused by a strong odor of perfume emanating from the black suitcase. Concerned that the suitcase might contain explosives, Sergeant Taplett had it x-rayed. That process revealed a number of dense, rectangular-shaped objects. Officer Mantel stayed with the suitcases while Sergeant Taplett arranged to move the suitcases to the airport police station. Pet. App. 3.

At that point, Hawkins-Garner decided to open the black suitcase. After receiving permission from her supervisor to open the bag, she obtained a hammer and a screwdriver and asked Officer Mantel to open it for her. Sergeant Taplett advised Officer Mantel that he could open the suitcase if Northwest wanted it opened. Officer Mantel then used the hammer and screwdriver to force open the lock on the suitcase. The suitcase was subsequently determined to contain 17 kilograms of cocaine and 77 grams of cocaine base. Pet. App. 3-4.

Shortly thereafter, Northwest in Washington, D.C., was notified that petitioner had arrived in Miami and was looking for his suitcases. Drug Enforcement Administration agents arranged for a controlled delivery of the suitcases to petitioner. The next day, petitioner was arrested after he picked up the suitcases in Miami and admitted that the suitcases belonged to him. Petitioner confessed that he had been trafficking drugs from Miami to Detroit for several months. A consensual search of peti-

tioner's home produced an additional $225,000 in cash. Pet. App. 4.

2. Petitioner was indicted on cocaine trafficking charges and moved to suppress the cocaine seized from his black suitcase and the indirect fruits of that search. The district court denied the motion based on the inevitable discovery exception to the exclusionary rule. Pet. App. 19-26. In denying the motion to suppress, the district court determined that absent the illegality, the airport police would have returned the suitcase to Northwest, which would have searched it under its standard policy:

> The police misconduct in this case was the warrantless search of the black suitcase, thus the Court must consider what would have happened had the illegal search not occurred. Had the police acted lawfully, once the bag was seized and it was determined that it posed no danger of exploding, they would have sought a search warrant. The government concedes that under the facts of this case, it is unlikely that a search warrant would have been issued. If the police had been unable to secure a warrant, they would have been required to return the suitcase to Northwest Airlines unopened. Northwest would then have opened the suitcase, pursuant to its lost luggage policy, in an effort to locate its owner.

Id. at 24 (footnote and citation omitted). Because the action of Northwest in opening the bag would have been a "search" by a private entity rather than the police, the district court concluded that the Fourth Amendment would not have been violated. *Id.* at 25. Following the denial of his motion to suppress, petitioner entered a conditional plea of guilty to con-

spiring to distribute cocaine, in violation of 21 U.S.C. 846, reserving his right to appeal the denial of the motion.

3. The court of appeals affirmed. Pet. App. 1-18. It agreed with the district court that the evidence resulting from the warrantless search of the black suitcase would inevitably have been discovered by lawful means. The court of appeals recognized that the inevitable discovery exception requires proof that the evidence inevitably would have been acquired through lawful means had the government misconduct not occurred. *Id.* at 7, citing *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). Further, the court noted that proof of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts," and that the exception requires the district court to "determine, viewing affairs as they existed at the instant before the unlawful search, what would have happened had the unlawful search never occurred." Pet. App. 7.

The court of appeals noted that decisions in other circuits had announced divergent positions on the question whether the inevitable discovery exception requires proof that at the time of the illegal search a separate independent line of police investigation was underway. See Pet. App. 8-9. It then ruled that, because the exception ultimately turns on the ineluctability of discovery rather than a specific means of discovery, "the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate *either* the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence *or* other compelling facts establishing that the disputed evidence inevitably would have been discovered." *Id.* at 13.

Applying that standard, the court of appeals held that the disputed evidence in this case inevitably would have been discovered. Pet. App. 13-17. The court of appeals relied in large measure on the existence of Northwest's "routine procedure" in opening lost luggage for identification purposes. *Id.* at 15. The court observed:

> Prior to the intervention of the airport police, Hawkins-Garner had already decided to open the suitcases pursuant to Northwest's policy of opening lost luggage. Even after the airport police arrived, Hawkins-Garner still thought she should open the suitcase because she considered it to be in Northwest's custody. Hawkins-Garner testified that she would have opened the suitcase herself or had another employee to do so if Officer Mantel had not opened it for her. Therefore, it is clear that, pursuant to Northwest's lost luggage policy, Hawkins-Garner would have opened the black suitcase and discovered the evidence in a private search had the airport police not become involved. Because a private search was inevitable, the cocaine is admissible pursuant to the inevitable discovery exception to the exclusionary rule.

Id. at 15-16.*

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* The court of appeals also rejected petitioner's argument that the inevitable discovery exception should not apply because the law enforcement officers might not have relinquished control of the black bag to Northwest. If the officers had maintained custody of the bag to seek a warrant, the court of appeals pointed out, the officers would have conducted a search pursuant to that warrant; if a warrant had not issued, Northwest would have conducted a private search after the suitcase had been returned. In either case, the court con-

ARGUMENT

1. The inevitable discovery doctrine permits illegally seized evidence to be admitted at trial where the government establishes "that the information ultimately or inevitably would have been discovered by lawful means." *Nix* v. *Williams*, 467 U.S. at 444. Petitioner contends (Pet. 9-13) that the decision of the court below conflicts with decisions from the Fifth, Tenth, and Eleventh Circuits that, he suggests, bar the application of the inevitable discovery exception unless the government can demonstrate the existence of "a previously initiated independent line of investigation." Pet. 10. Although there is some disagreement among the courts of appeals in the description of the circumstances in which the inevitable discovery exception may apply, the present case is not in conflict with the holding of any other court of appeals.

Petitioner first relies on *United States* v. *Owens*, 782 F.2d 146, 152-153 (10th Cir. 1986), a case involving an unconstitutional police seizure of cocaine from a closed bag inside a closed dresser drawer in a motel room after the occupant had been arrested outside. The government argued in *Owens* that the inevitable discovery exception should apply because the motel maid's routine cleaning for the next occupant would have revealed the contraband. Because "[s]everal factors suggest[ed] that motel employees performing routine cleaning may not have inevitably discovered the cocaine," the court of appeals rejected the government's argument. *Id.* at 153. The factors con-

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cluded, a lawful search inevitably would have been conducted, and the cocaine would have been discovered. Pet. App. 17-18.

sidered in *Owens* included: (1) the possibility that motel staff might not have found, or opened, the small closed container of cocaine; (2) that in view of the lack of any police involvement in routine room cleaning the motel staff might not have recognized the cocaine or turned the drugs over to the police; (3) that absent the illegal search, the occupant might have posted bail and returned to the motel room before the cleaning staff; and (4) that a friend of the occupant could have claimed the closed bag. Those factors led the *Owens* court to reject the application of the inevitable discovery exception because it was "highly speculative" whether discovery of the contraband was inevitable. *Ibid.* The decision in *Owens* does not conflict with the conclusion of the court below that in this case, a private search by Northwest under its standard procedures was inevitable. See *United States* v. *Woody*, 55 F.3d 1257, 1270 (7th Cir.) (evidence in automobile would inevitably have been discovered in subsequent mandatory inventory), cert. denied, 116 S. Ct. 234 (1995); *United States* v. *Horn*, 970 F.2d 728, 732 (10th Cir. 1992) (inevitable discovery doctrine applied where weapons found in an automobile during a roadside stop would inevitably have been discovered in a subsequent inventory following impoundment).

Petitioner also relies upon *United States* v. *Cherry*, 759 F.2d 1196 (5th Cir. 1985), in which the court of appeals wrote that application of the inevitable discovery exception requires, among other things, proof "that the government was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation." *Id.* at 1206. Unlike this case and *Owens*, *Cherry* did not involve any question of an inevitable lawful search by a private party. Rather, the entire investigation in

Cherry was conducted by government officers, and the question presented was whether a lawful search conducted by those officers was inevitable. Because of a concern that the exception would "swallow the rule" if it allowed otherwise tainted evidence to be admitted "merely because the police could have chosen to act differently and obtain the evidence by legal means," the *Cherry* court required not only proof that the evidence would have been discovered in any event, but also proof that the police were actively pursuing a substantial alternate line of investigation at the time of the misconduct. *Id.* at 1205-1206. *Cherry* thus did not address the circumstances in which an inevitable private search might allow the application of the inevitable discovery exception.

Similarly, in *United States* v. *Satterfield*, 743 F.2d 827, 845-847 (11th Cir. 1984), the court rejected the government's argument that a weapon illegally seized from under sofa cushions at the defendant's residence should have been admitted under the inevitable discovery exception because it would have been found in a later warrant-authorized search. Because the court believed that the police should not be allowed to forgo obtaining a warrant until after their search has disclosed the presence of the evidence, it required that "the police must possess and be actively pursuing the lawful avenue of discovery when the illegality occurred." *Id.* at 847. As in *Cherry*, *Satterfield* did not resolve the requirements for an application of the inevitable discovery exception founded on the inevitability of a private search.

The court below correctly concluded that the inevitable discovery exception was applicable in this case because of the Northwest policy regarding the opening of lost luggage. The court of appeals appro-

priately did not require that a separate and independent government investigation be in progress at the time of the police misconduct, but it did require proof of "compelling facts establishing that the disputed evidence inevitably would have been discovered." Pet. App. 13. That standard was more than adequate to ensure, in the context of the claim that later events would have led to a lawful *private* search, and thus that the discovery of the evidence was truly inevitable. See *United States* v. *Boatwright*, 822 F.2d 862, 864-865 (9th Cir. 1987) (Kennedy, J.) (suggesting that development of inevitable discovery doctrine proceed on a "case by case" basis).

2. Petitioner also contends (Pet. 14-21) that the government did not sufficiently demonstrate that a lawful search of the black suitcase was inevitable here. Based on the evidence adduced at the suppression hearing both the district court and the court of appeals determined that the contraband in petitioner's black suitcase inevitably would have been discovered. The routine procedure of Northwest to open and inventory lost luggage, a procedure that was in fact being employed by the Northwest employee on the scene, fully sufficed in the circumstances here to establish that the disputed evidence inevitably would have been discovered. See Pet. App. 13-18. That factbound determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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